

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

&

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

CRL.A.No. 1143 of 2004()

**SC.100/2001 of ADDL.SESIONS COURT, THODUPUZHA
CP.80/2000 of JUDL. MAGISTRATE OF FIRST CLASS COURT, NEDUMKANDOM**

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APPELLANT:

**MAMACHAN, S/O. OUSEPH,
CONVICT NO.7996, CENTRAL PRISON,
THIRUVANANTHAPURAM.**

BY ADV. SMT.SANGEETHA LAKSHMANA

RESPONDENTS:

**STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR.**

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 05/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.1143 OF 2004 ()

Dated this the 5th day of September, 2007

J U D G M E N T

KOSHY,J.

According to the prosecution, a five month pregnant woman was brutally murdered by the appellant accused who was living with her as husband on the basis of a registered agreement. He was charge sheeted for the offence punishable under Section 302 of the Indian Penal Code. It is the case of the prosecution that deceased Jessy has lived with one Ali as husband and wife for sometime and later under a registered agreement started living with the accused. The latter doubted her chastity and used to treat her with cruelty and on 24.10.1999, at about 2 p.m. accused killed her with a chopper.

2. PW5 brother of the deceased on hearing the news rushed to the house and saw his sister in a pool of blood and he

gave Ext.P6 F.I.Statement. He also deposed that six months before the incident, Jessy married the accused. But due to suspicion of chastity accused used to treat her cruelly and because of the cruelty she came to his house to live along with him. It is also stated that accused used to visit his house to meet her and while giving evidence he also deposed that he saw the accused in that morning near the place (Rajakumari). He also reiterated the incident as mentioned in Ext.P6 F.I.Statement. During cross examination, he stated that Ali, former husband of the deceased did not visit her after the marriage with the accused.

3. PW7 is the son of the deceased through Ali. He was only four years at the time of incident and at the time of giving deposition he was five years old. He stated clearly in terms of the prosecution case. He is a direct witness. PW8 who was also a close neighbour saw deceased and accused together in the house near the time of the incident. After hearing the cry, PWs.8 and 9 saw the accused coming out of the house with the chopper. The above chopper was recovered on the basis of the disclosure made by the accused. F.S.L. report shows that the

chopper contained human blood. On hearing the cry neighbours gathered and they found accused coming out with the chopper. In 313 Statement, case of the accused was that when he visited his wife in the house, he found Ali there and Ali tried to struck him with a chopper but it fell on the deceased and that shows admission of the presence of the accused therein at the time of incident. None of the witnesses has stated presence of Ali therein. There is also no such suggestion when they were cross examined. There were no evidence regarding the presence of Ali on that day.

4. Now we will also consider the post mortem report and the nature of injuries inflicted on the accused. Ext.P5 is the Post Mortem certificate and PW4 proved the above Post Mortem report. The anti-mortem injuries were as follows:

Injuries:

1. Incised wounds vertex of the scalp 10 cms x 0.5. Scalp deep Blood clots seen over the area.
2. Incised wound posterior to left ear 4 cms x 0.5 x 0.5.

3. Incised wound left side of neck 5 cms x 0.5 x 1 cm.
4. Incised wound front of chest, from the middle of sternum to 5 cms. above the umbilicals. It was 24 cms in length. The liver, heart and diaphragm were injured and parts of small intestine, large intestine and stomach were protruded out. The injured and separated parts of liver seen inside the abdomen. There was full of blood in the abdominal cavity.
5. Incised wound left hand 3 cms below the wrist, the hand was almost separated except thumb.
6. Lacerated wound left nipple.
7. Incised wound, left let 5 cms above left head, 4.5 cms x 0.5 cm x 1 cm the bone was fractured.
8. Incised wound 1.5 cm above the wound No.-6.5 cm x 0.5 x 1 cm.
9. Incised wound left leg 8 cms above the heel-6.5 cms x 0.5 x 1 cm deep.
10. Another incised wound of 5 cms x 0.5 x 1 cm close to the wound No.9.
11. Skin abrasion of 5 cms on the posterior aspect of left upper arm.
12. Incised wound 3 cm x 0.5 cm x 1 cm over the right scapula.

It was also noticed by the Doctor that the deceased was pregnant by 20 weeks. Opinion as to the cause of death was "Cardio respiratory arrest due to shock due to severe bleeding

due to multiple injuries.” If the explanation of the accused in 313 Statement is accepted, there can be only one injury whereas post mortem report shows that she was brutally murdered with several injuries and liver was cut into pieces. Therefore it can be seen that a pregnant woman was killed brutally by the accused. Both intestine, liver, heart, diaphragm etc. were cut and parts of the same were protruded out.

5. It was argued that PW7 the main witness of the prosecution is a child witness. He was only four years at the time of incident and within one year he was examined in the court. The reliance of the evidence of PW7 itself is sufficient to set aside the conviction imposed on the appellant. Section 118 of the Evidence Act, 1872 reads as follows:

“118. **Who may testify:-** All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind.

It can be seen from the aforesaid provision that the general

rule is that capacity and competency of the person offered as a witness is presumed unless existence of incapacity is established. The competency, adequacy and admissibility are different even though the line dividing the three aspects are very thin. In view of Section 118 of the Evidence Act, it is necessary for the Court to hold preliminary inquisition, before commencement of recording of evidence to evaluate the mental ability of a child witness. The court has to determine (1) whether a child is understanding the questions put to him or giving rational answers to the questions or not, (2) whether the child has that capacity to understand sanctity of speaking the truth and the sanctity of oath, (3) whether the child has given his evidence free from any tutoring or prompting. The court has to satisfy itself that the child is competent to testify on the facts within his knowledge. Before the examination starts it is advisable that the court should record its opinion that the child is understanding the questions put to him or giving rational answers to the questions. **(See State v. Bachmiya Musamiya (1999 (3) GLR 2457), Ratansingh Dalsukhbhai Nayak v. State of Gujarat (AIR 2004 SC 23), Rameshwar Kalyan Singh v. State of Rajasthan (AIR 1952 SC 54).**

Now we may also consider necessity of taking oath before giving evidence. Section 4 of the Oaths Act, 1969 reads as follows:

4. Oaths or affirmations to be made by witnesses, interpreters and jurors – (1) Oaths or affirmations shall be made by the following persons, namely:-

- (a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;
- (b) interpreters of questions put to, and evidence given by, witnesses; and
- (c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or

affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer, in a criminal proceedings, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Therefore every person appearing as a witness has to take an oath. However, Proviso to Section 4 provides that a child below the age of 12 years need not take an oath but the court should ensure that the child knows his duty to speak the truth. Omission to administer the oath even to an adult and competent witness only affect his credibility and not his competence. The Supreme Court in **Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)** held that evidence of a child witness can be the basis of conviction even

in the absence of oath, provided, child witness was able to understand the questions put to him and able to give rational answers thereof and his evidence is otherwise reliable. Merely because a witness is a child it cannot be rejected if it is found otherwise reliable and evidence of child witness has to be evaluated carefully. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored as it is easy to teach a child witness. After close scrutiny, evidence of child witness can be accepted if the evidence is credible. **(See *Surya Narayana v. State of Karnataka* (AIR 2001 SC 482) and *N.Somashekar v. State of Karnataka* (AIR 2005 SC 1510))**. It was also held right from the decision in ***Mohamed Sugul Esa Mamasan Rer Alalah v. The King* (AIR (33) 1946 Privy Council 3)** that even though it is duty of the Court to ascertain the competency and capability of the child witness before the examination, his evidence cannot be rejected if the trial court

after considering the evidence finds that the evidence is believable. After considering various decisions, C.J. Mr.U.L.Bhat speaking for the Division Bench of Gauhati High Court in **Kabiraj Tudu v. State of Assam (1994 Crl.L.J. 432)** observed as follows:

“10. Whenever a witness appears before Court, the Court will proceed on the basis that he is competent to testify. When a witness is a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the Court is alerted to test his competency. Similarly where a witness is a child the Court is alerted on the need to decide whether oath can be administered. Ordinarily this satisfaction is to be arrived at by preliminary examination of the witness by the Court. This does not mean that in the absence of preliminary examination the evidence becomes inadmissible since the general rule is in favour of the competency and satisfaction, if necessary, can be arrived in the course of the evidence. However, trial Courts would do well to conduct preliminary examination to satisfy themselves in regard to the competency under Section 118 of the Evidence Act as well as under the proviso to Section 4(1) of the Oaths Act. It is highly desirable to bring on record the questions and answers put to the witness and to make a record of the satisfaction of the Court. Even in the absence of specific record of preliminary questions or the satisfaction the appellate Court could examine the nature and tenor of the evidence recorded, the manner in which the witness faced in cross examination and satisfy itself about the competency under both the provisions.”

In this case, the trial court found as follows:

“The child witness has given very intellectual answers in the cross examination, which inspires confidence. In the examination in chief he stated that when the accused came to the place of occurrence he along with the deceased was about to go out to buy some books for him. In the cross examination he was asked whether on the date of occurrence he had gone to school. The spontaneous answer was that it was a Sunday. To the question how he knew about it, the child said that he had gone to church. - - - - I am fully convinced that PW7 is an honest witness and his testimony can be acted upon.”

Since the child was below 12 years, oath need not be taken under the Oaths Act, as provided in the Proviso to Section 4 of the Oaths Act, it is the duty of the Court to put the evidence of the child witness to close scrutiny, and, if it is found to be acceptable, Court can rely on the same. Absence of oath alone will not make his evidence disbelievable. Here Sessions Court was satisfied that the child was giving the truthful evidence. We see no reason to find any error in relying on the evidence of PW7. Apart from the above, in this case, evidence of other witnesses as we have already narrated conclusively proves that accused is guilty of the charges levelled against him. Therefore, even if evidence of PW7 is eschewed, evidence

of PWs.8, 9 and 10 proves the prosecution story. They explained what was happened at the place of occurrence and they also saw accused going with the weapon from the house when they arrived there and recovery of blood stained MO3 chopper and other corroborating materials and circumstances conclusively proves guilt of the accused.

We fully agree with the conviction of the accused under Section 302 of the I.P.C. by the trial court and no grounds are made out for interfering in the sentence. Hence this appeal is dismissed.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.1143 OF 2004 ()

J U D G M E N T

5th September, 2007